

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JENNY RUBIN DEBORAH RUBIN DANIEL
MILLER ABRAHAM MENDELSON STUART E
HERSH RENAY FRYM NOAM ROZENMAN
ELENA ROZENMAN and TZVI ROSENMAN

M19-63

Plaintiffs Judgment
Creditors

against

THE ISLAMIC REPUBLIC OF IRAN (a/k/a/ Iran
The Republic of Iran Republic of Iran The
Government of Iran Iranian Government and
Imperial Government of Iran) THE IRANIAN
MINISTRY OF INFORMATION AND SECURITY
AYATOLLAH ALI HOSEINI KHANENEI ALI
AKBAR HASHEMI RAFSANJANI and ALI
FALLAHIAN KHUZESTANI

Defendants Judgment
Debtors

x

STATEMENT OF INTEREST OF THE UNITED STATES

MICHAEL J GARCIA
United States Attorney for the
Southern District of New York
86 Chambers Street 3rd Floor
New York New York 10007
Tel (212) 637 2732
Fax (212) 637 2730
beth goldman@usdoj gov

BETH E GOLDMAN
Assistant United States Attorney

— Of Counsel —

STATEMENT OF INTEREST OF THE UNITED STATES

Pursuant to 28 U S C § 517 ¹ the United States of America (the United States) submits this Statement of Interest to express the view that the Court should deny the application of the plaintiffs judgment creditors in the above captioned action (Plaintiffs) for an order appointing Plaintiffs counsel Robert J Tolchin as a receiver authorized to sell the real property located at 34 East 69th Street New York New York (the Consular Property)

PRELIMINARY STATEMENT

Plaintiffs are victims and family members of victims of a terrorist attack at an outdoor pedestrian mall in Israel They brought suit against Iran and other Iranian government defendants based on their alleged provision of training and material support to the group responsible for the attack The District Court for the District of Columbia entered a default judgment in favor of the Plaintiffs under Section 1605(a)(7) of the Foreign Sovereign Immunities Act (FSIA) in an amount totaling \$71 5 million in compensatory damages See Rubin et al v Islamic Republic of Iran et al 281 F Supp 2d 258 (D D C 2003) To satisfy the judgment which they registered in the United States District Court for the Southern District of New York Plaintiffs now seek the appointment of a receiver to sell the Consular Property pursuant to section 201 of the Terrorism Risk Insurance Act of 2002 (TRIA) Pub L No 107 297 116 Stat 2322

The United States in no way condones the actions giving rise to the judgment in the underlying action However Plaintiffs attempt to sell the Consular Property must be rejected because TRIA does not allow for execution against the Consular Property TRIA provides that

¹ Pursuant to 28 U S C § 517 [t]he Solicitor General or any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States or in a court of a State or to attend to any other interest of the United States

certain 'blocked assets' may be subject to execution or attachment to satisfy the compensatory damages portion of a judgment awarded against a terrorist party. TRIA, however, specifically excludes from the definition of 'blocked asset' property that is (1) subject to the Vienna Convention on Diplomatic Relations done Apr. 18, 1961, T.I.A.S. No. 7502, 23 U.S.T. 3227 or the Vienna Convention on Consular Relations done Apr. 24, 1963, T.I.A.S. No. 6820, 21 U.S.T. 77 (the 'Vienna Conventions') and (2) being used exclusively for diplomatic or consular purposes. Because the Consular Property meets both of these conditions - it is subject to the Vienna Convention on Consular Relations and it is being used exclusively for diplomatic or consular purposes - it does not constitute a 'blocked asset' under TRIA and it may not be executed against under that statute. See Hegna v. Islamic Republic of Iran, 376 F.3d 485, 494 (5th Cir. 2004) (holding that former residence of Iranian Consul General in Houston, Texas, not a blocked asset under TRIA because it met both conditions). Accordingly, Plaintiffs' application should be denied.

FACTUAL BACKGROUND

A The United States' Treaty Obligations Under the Vienna Conventions and the Foreign Missions Act

The United States ratified the Vienna Convention on Consular Relations (VCCR) in 1969. Among the reciprocal obligations specified in the Convention, the treaty requires a receiving State to safeguard the consular premises and the property of the consular post of a sending State when consular relations between the countries have been disrupted. In the event of the severance of consular relations between two States, the VCCR requires that the receiving State shall, even in the case of armed conflict, respect and protect the consular

premises together with the property of the consular post and the consular archives VCCR Art 27(1)(a) The treaty defines a consular post to include any consulate general consulate vice consulate or consular agency VCCR Art 1(1)(a)

In addition the Foreign Missions Act (FMA”) specifically authorizes the Secretary of State to protect and preserve any property of [a] foreign mission when a foreign mission has ceased conducting diplomatic consular and other governmental activities in the United States 22 U S C § 4305(c)(1) see also id § 4302(a)(3) (defining foreign mission as any mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of or which is substantially owned or effectively controlled by a foreign government)

B The Consular Property Is in the Custody of the U S Department of State

On November 14, 1979 all Iranian assets in the United States were blocked by Executive Order 12170 See Declaration of Claude J Nebel, Deputy Assistant Secretary of the Office of Foreign Missions of the United States Department of State dated December 5 2007 (‘Nebel Dec) at ¶ 5 Iran continued to occupy and use its Embassy consulates and diplomatic residences until the United States severed diplomatic relations with Iran on April 7 1980 See id at ¶¶ 5 6 As a result of that action Iranian diplomatic personnel who occupied the properties were declared persona non grata, and the United States took custody of all Iranian diplomatic and consular real properties including the Consular Property See id at ¶¶ 6 14 15

On April 14 1980 the Department of State approved Algeria as the protecting power for Iranian interests in the United States² Nebel Dec at ¶ 8 The Department of State informed

² Algeria is no longer the protecting power for Iranian interests in the United States See Nebel Dec at ¶ 8 n 1 Pakistan now serves in that capacity See id

Algeria that the United States would retain custody over Iran's diplomatic and consular properties. See id. The Department of State also informed Algeria that it would take all appropriate measures for the safety and protection of such diplomatic and consular premises in the United States. Id. at ¶ 8 & Exh. 4 at 338. The diplomatic and consular properties of Iran have remained in the custody of the Department of State since 1980 and specifically in the custody of the Department of State's Office of Foreign Missions (OFM) since that office was created in 1982. See id. at ¶ 10. Those properties remain blocked pursuant to Executive Order 12170 (Nov. 14, 1979), 44 Fed. Reg. 65,729 (Nov. 14, 1979). See id.

By a diplomatic note tendered on March 10, 1983, the United States notified Algeria that the United States would continue to respect and protect Iran's diplomatic and consular property under the Vienna Conventions and that it intended to rent out some of Iran's properties in order to protect Iran's interest in those properties. See Nebel Dec. at ¶ 11 & Exh. 5. The United States determined that rental of the properties would further its obligation to protect the properties by keeping them occupied and generating a source of funds that could be used for the maintenance of the properties. See id. The United States is currently leasing or has in the past leased all but one of the Iranian real diplomatic and consular properties to third parties. See id. at ¶ 14. The Consular Property, which was formerly used as the residence of the Consul General of Iran in New York, has been rented to a number of tenants and is currently leased to a private party. See id. at ¶ 15.

C TRIA

TRIA § 201 enacted on November 26 2002 provides

Notwithstanding any other provision of law, and except as provided in subsection (b) in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism or for which a terrorist party is not immune under section 1605(a)(7) of title 28 United States Code the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable

TRIA § 201(a) (emphasis added) TRIA § 201(d) defines a blocked asset as

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U S C App 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U S C 1701 1702) and

(B) does not include property that —

(11) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations or that enjoys equivalent privileges and immunities under the law of the United States is being used exclusively for diplomatic or consular purposes

TRIA § 201(d)(2) (emphasis added) TRIA further defines property subject to the Vienna Conventions

(3) CERTAIN PROPERTY — The term property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations and the term asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations means any property or asset respectively the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations as the case may be

TRIA § 201(d)(3)

In short, property is not a 'blocked asset' subject to attachment under TRIA if (i) the property is subject to the Vienna Conventions, and (ii) the property is used exclusively for diplomatic or consular purposes

ARGUMENT

PLAINTIFFS CANNOT SELL THE CONSULAR PROPERTY BECAUSE IT IS NOT A BLOCKED ASSET WITHIN THE MEANING OF TRIA SECTION 201

TRIA § 201(a) permits plaintiffs with certain judgments against a terrorist party to attach a 'blocked asset' of the terrorist party in order to satisfy the compensatory damages portion of a judgment. TRIA, however, excludes from its definition of 'blocked asset' any property subject to the Vienna Convention on Consular Relations '[that] is being used exclusively for diplomatic or consular purposes.' TRIA § 201(d)(2)(B)(ii) 116 Stat. at 2340. Because the Consular Property is subject to the VCCR and is being used exclusively for diplomatic or consular purposes, it is not a blocked asset under TRIA and thus is not subject to attachment under that statute.

A The Consular Property Is Subject to the VCCR

As plaintiffs admit, the Consular Property was used as the residence of the Counsel General of Iran in New York. See Pl. Memo. at 5; see also Nebel Dec. ¶ 15; Hegna v. Islamic Republic of Iran, 299 F. Supp. 2d 229, 230 (S.D.N.Y. 2004) (recognizing that same property at issue here is the former New York residence of the Consul General of Iran); aff'd, 402 F.3d 97 (2d Cir. 2005). The VCCR definition of 'consular post' includes 'any consulate general, consulate, vice consulate or consulate agency.' VCCR Art. 1(1)(a). The United States interprets

property of the consulate post in Article 27(1)(a) to include real property such as the Consular Property at issue here. See Nebel Dec ¶¶ 9-15³ see also Hegna v Islamic Republic of Iran, 376 F.3d at 494 (finding that VCCR covers former residence of General Consul of Iran in Houston Texas)

Under the VCCR the United States is required to respect and protect the consular premises together with the property of the consular post and the consular archives. VCCR Art 27(1)(a). Thus the VCCR mandates that the United States protect the Consular Property from an order of execution against it. The respect and protect obligation under VCCR Art 27(1)(a) applies not just to the United States' treatment of property in this country owned by Iran but also to the Iranian government's treatment of United States consular property in Iran. Accordingly an order of execution against the Consular Property could impair the ability of the United States to obtain reciprocal compliance from Iran. See generally 767 Third Avenue Assocs. v Permanent Mission of the Republic of Zaire, 988 F.2d 295-302 (2d Cir. 1993) (noting that judicial reform of multilateral treaties could have dangerous international repercussions in the form of reciprocal action by other states (quoting Lori J. Shapiro Foreign Relations Law: Modern Developments in Diplomatic Immunity 1989 Ann. Surv. Am. L. 281-295)).

B The Property Is Being Used Exclusively for a Diplomatic or Consular Purpose

To fall under TRIA's exemption from the definition of "blocked asset" a foreign state's

³ This view is entitled to substantial deference because the Executive Branch is charged by the Constitution with conducting the foreign policy of the United States including negotiating treaties. See, e.g., Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

property subject to the VCCR must be used exclusively for diplomatic or consular purposes”⁴

By renting Iran’s consular property and using the proceeds to maintain the properties the United States is fulfilling its obligation under VCCR Art. 27(1)(a) to respect and protect Iran’s consular properties (See Nebel Dec. ¶¶ 11-15 (State Department’s determination that to fulfill the U.S. obligation under the Vienna Conventions “the real properties could not be adequately maintained over any significant period of time if not occupied [and] that rental would provide a source of funds for essential maintenance and repairs”) id. (State Department’s determination that “actions in connection with the maintenance and rental of Iran’s diplomatic and consular property have been and continue to be taken exclusively for diplomatic and consular purposes as such actions are in furtherance of obligations of the United States as the receiving State to protect the property pursuant to the Vienna Conventions.”))

Because rental of the Consular Property has served – and was intended – to provide funds to maintain and repair the property in an effort to comply with the United States’ respect and protect obligations under the VCCR, the United States’ use of the property is exclusively for diplomatic or consular purposes. See Hegna v. Islamic Republic of Iran, 376 F.3d at 494 (holding that United States has used Iranian consular property in Houston solely for diplomatic purpose by renting it in order to further its treaty obligations) Hegna v. Islamic Republic of Iran, 287 F. Supp. 2d 608, 610 (D. Md. 2003) (“[T]he goal of assuring that the United States is in

⁴ Plaintiffs’ contention Pl. Br. at 5 that because the Consular Property remains blocked under Executive Order 12170 it constitutes “blocked assets” under TRIA is patently wrong. While the 1979 Executive Order remains in effect with respect to consular and diplomatic property, see Nebel Dec. ¶ 10, TRIA expressly excludes from the category of “blocked assets” any property regardless of whether that property was seized, frozen or blocked that is subject to the Vienna Conventions and is being used exclusively for diplomatic or consular purposes. TRIA § 201(d). See Hegna, 287 F. Supp. 2d at 609.

compliance with its treaty obligations is quintessentially diplomatic) aff'd on other grounds

376 F.3d 226 (4th Cir. 2004) ⁵

⁵ Plaintiffs rely exclusively on TRIA as a basis to execute against the Consular Property. There is no other source of law that would allow Plaintiffs to sell the Consular Property, and indeed, the Consular Property is specifically exempted from attachment or execution under both the FSIA and the FMA. Under the FSIA, property in the United States of a foreign state is presumptively immune from attachment. 28 U.S.C. § 1609. An exception from immunity may arise where the foreign state uses the property for a commercial activity in the United States. 28 U.S.C. 1610(a). see Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) (operative test under FSIA is whether use by foreign state constitutes commercial activity). Because the Iranian Government used the Consular Property as the residence of the Consul General of Iran in New York and not for a commercial activity, the Consular property is immune from execution or attachment under the FSIA.

The FMA, in turn, specifically prohibits attachment of mission property being held by the Department of State. 22 U.S.C. § 4308(f) (assets of or under the control of the Department of State, wherever situated, which are used by or held for the use of a foreign mission shall not be subject to attachment, execution, injunction, or similar process, whether intermediate or final). OFM currently has custody over Iran's diplomatic and consular property under 22 U.S.C. § 4305. Nebel Dec. ¶¶ 4-14. Therefore, the Consular Property is immune from attachment under the FMA.

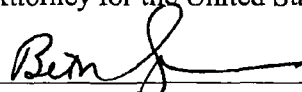
CONCLUSION

For the reasons stated herein Plaintiffs application for appointment of a receiver to sell
the Consular Property should be denied

Dated New York New York
December 13 2007

MICHAEL J GARCIA
United States Attorney for the
Southern District of New York
Attorney for the United States

By



BETH E GOLDMAN
Assistant United States Attorney
86 Chambers Street 3rd Floor
New York New York 10007
Tel (212) 637 2732
Fax (212) 637 2730
beth.goldman@usdoj.gov

CERTIFICATE OF SERVICE

I Cathaline Rodriguez, am employed in the United States Attorney's Office for the Southern District of New York, on the December 13 2007 I served a copy of the within STATEMENT OF INTEREST OF THE UNITED STATES by causing a service copy to be delivered by FEDERAL EXPRESS to the following

Robert Tolchin, Esq
Jaroslawicz & Jaros, LLC
225 Broadway 24th Floor
New York, New York 10007

I certify under penalty of perjury that the foregoing is true and correct

By Cathaline Rodriguez

December 13, 2007
New York, New York